

OLD RECORD COPY

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OLC 78-1163/1

12 April 1978

MEMORANDUM FOR THE RECORD

SUBJECT: S. 1437, Omnibus Revision of the Federal Criminal Code

1. A meeting was held to discuss DCI/CIA concerns with S. 1437, the "Criminal Code Reform Act of 1978," which passed the Senate on 30 January 1978 and currently is under active consideration by the Criminal Justice Subcommittee of the House Committee on the Judiciary. The meeting was held in the offices of the House Permanent Select Committee on Intelligence, and was attended by the following Committee staff members: Mr. Michael O'Neil, Mr. William Funk, and Mr. Bernard Raimo. Mr. Ronald Gainer, Deputy Assistant Attorney General for the Office for Improvements in the Administration of Justice, attended. Present on behalf of the DCI, in addition to the undersigned, were  Assistant General Counsels.

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2. The DCI representatives explained the nature of our concern with this legislation, namely, the legislation's failure to provide explicitly a "defense of public authority" and the resulting uncertainty and potential problems that might develop if and when CIA officers carry out authorized activities that are at the same time on their face violative of provisions in this legislation. It was stressed that, although S. 1437 contains in section 501 reference to the general common law public authority defense, and although the Agency has in the past been advised by the Department of Justice that certain existing criminal statutes do not extend to official activities otherwise authorized pursuant to law, the broad reach of this legislation and the current environment in which intelligence officers must operate, requiring a much greater degree of attention than previously to engaging only in those activities that are clearly if not explicitly authorized, makes us very uncomfortable with this legislation, which sets forth numerous explicit proscribed activities without corresponding recognition of an official duty defense.

3. Following a brief explanation by Mr. Gainer as to the reasons why the specific defenses, including the public authority defense, previously incorporated in S. 1, the predecessor legislation, were dropped from S. 1437 in the interest of compromise, there was general consensus that perhaps the key question with which Congress must come to grips is exactly what activities are or should intelligence agencies be authorized to conduct (particularly those related to civil rights). One of the many problems that would be encountered in coming to grips with this question lies in deciding which provisions in S. 1437 should apply to intelligence officers, since to do so in the open, which is desirable, inevitably will raise concerns which are neither easily explainable nor likely to be easily understood by the public. It was noted that the intelligence charter legislation, now before both intelligence oversight committees, in large part will address the basic question of what activities Congress intends intelligence agencies and officers to be able to conduct. For the following reasons, however, it was stressed by the DCI representatives that the inter-relationship between proper intelligence activities and Federal criminal statutes applicable to persons generally, should be considered in the context of congressional consideration of S. 1437:

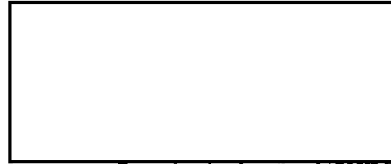
--There would not be a complete overlap between the authorizing provisions in the charter legislation and the enumerated proscribed activities in the criminal code revision;

--It would be extremely difficult, if not impossible, and undesirable at any rate, to attempt to specifically identify each and every activity which intelligence officers and agencies should be authorized to perform, and, conversely, each and every civil or criminal proscriptive statute that should be made not applicable to intelligence officers and agencies;

--There may very well be an extended period of time before which the intelligence charter legislation will be enacted; and

--The current environment in which intelligence officers must operate, with increasing oversight and required deference to regulations and statutes, is creating great uncertainty and hesitancy to engage in intelligence or intelligence-related activities absent very clear and unambiguous authority to carry out such activities (i.e., there is increasing attention being devoted to the question of whether or not an individual officer will run the risk of being liable to civil or criminal sanctions later on for conducting an intelligence activity that, although fully and appropriately authorized at the time, later is determined to be without sufficiently explicit statutory authority).

4. The members of the HPSCI staff indicated informally that they were sympathetic to our concerns and agreed that it would be appropriate to raise the issue with the House Judiciary Committee now considering the legislation. Mr. O'Neil stressed that these important issues should be raised in as open a manner as possible to both the Judiciary and Intelligence Committees. Mr. Gainer noted that, given the key role being played by Senator Edward Kennedy (D., Mass.) in this legislation, and in light of the sponsors' clear intent to move the legislation through the Congress as soon as possible, we might want to consider checking with Senator Kennedy to obtain his ideas on this matter and, if possible, perhaps obtain a commitment from him to consider the matter apart from S. 1437 in order not to hold up that bill. We agreed to be back in touch on this matter very shortly.



Assistant Legislative Counsel

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